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RICHARD A. ALLEN

September 8, 2006

BY HAND DELIVERY

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

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217524

Re: CSX Corp. *et al.* – Control and Operating Leases/Agreements – Conrail Inc. *et al.*, Finance Docket No. 33388 (Sub-No. 100), Petition for Clarification Or in the Alternative For Supplemental Order-North Jersey Shared Assets Area.

Dear Secretary Williams:

I enclose for filing in the above captioned proceeding an original and ten copies of a Reply of Norfolk Southern Corporation and Norfolk Southern Railway Company to Petitioners' Motion to Compel Responses to Discovery Requests Involving Relevancy Objections.

Sincerely,

Richard A. Allen

Enclosures

cc: All parties of Record

Before The
Surface Transportation Board

Finance Docket No. 33388 (Sub-No. 100)



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Office of Proceedings

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CSX CORPORATION AND CSX TRANSPORTATION, INC.
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
— CONTROL AND OPERATING LEASES/AGREEMENTS —
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

217524

**REPLY OF NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN
RAILWAY COMPANY TO PETITIONERS' MOTION TO COMPEL RESPONSES TO
DISCOVERY REQUESTS INVOLVING RELEVANCY OBJECTIONS**

Pursuant to the Board's order served August 29, 2006, Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS") submit this reply to the Motion to Compel Responses to Discovery Requests Involving Relevancy Objections filed by petitioners Bridgewater Resources, Inc ("BRI") and ECDC Environmental L.L.C. ("ECDC") on September 5, 2006. The objections that are the subject of the motion to compel were made to some of the interrogatories and document production requests that Petitioners served on August 4, 2006, and they were made on the grounds that the discovery request objected to goes beyond the "limited discovery" allowed by the Board in its decision served July 31, 2006 ("July 31, 2006 Decision") or is otherwise irrelevant to any issue presented by the BRI/ECDC petition instituting this proceeding and not reasonably calculated to lead to the discovery of relevant evidence.¹

¹ Pursuant to an agreement with Petitioners, NS and the other respondents, CSX and Conrail, submitted their objections on these grounds on August 29, 2006, and have reserved the right (continued...)

BACKGROUND

On January 20, 2006, BRI and ECDC filed a “Petition For Clarification Or In The Alternative For Supplemental Order—North Jersey Shared Assets Area.” This petition asked the Board to “clarify” that BRI’s waste transfer facility near Port Reading, New Jersey, is located in the North Jersey Shared Assets Area (“NJSAA”). The petition asked the Board in the alternative to issue a supplemental order “allowing Conrail to perform switching service between the BRI Facility and nearby Manville Yard of CSX Transportation, Inc. (“CSXT”).” BRI/ECDC Pet. at 17.

NS filed a motion to dismiss, in which it contended that BRI’s claim that its facility is within the NJSAA is refuted by the unambiguous terms and map of the Transaction Agreement and the North Jersey Shared Assets Agreement among NS, CSXT and Conrail as well as the deed by which Conrail conveyed the Lehigh Line west of CP Port Reading Junction to Pennsylvania Lines, LLC. NS also contended that the petitioners’ alternative request for a supplemental order authorizing Conrail to switch BRI’s facility was groundless. NS and Conrail also moved for a protective order quashing petitioners’ discovery request or suspending it pending a ruling on the motion to dismiss.

In its July 31, 2006 Decision, the Board granted the motion to dismiss petitioners’ alternative request for a supplemental order, stating:

In seeking a supplemental order that would authorize Conrail to provide its switching service outside the NJSAA, petitioners essentially request what the Board explicitly denied in Decision No. 89: “The ICC and the Board have consistently declined to attempt to equalize the rail transportation options of shippers who receive merger benefits with all those who do not . . . [T]his is not

(...continued)

to object to any of the discovery requests on other grounds when they respond generally to the petitioners’ discovery on September 18, 2006 under the current procedural schedule.

the kind of harm that the agency rectifies under its conditioning power.” 3 S.T.B. at 269-270. As the Board has dismissed similar claims seeking additional relief in previous Conrail decisions, it will decline to issue a supplemental order here. See, e.g., CSX Corp. et al. –Control—Conrail Inc., et al., 4 S.T.B. 107 (1999).

July 31, 2006 Decision, slip op. at 5.

The July 31, 2006 Decision denied NS’ motion to dismiss the petition for clarification, but with the following significant statements:

NS has presented strong evidence, based on the transaction agreement, to support its claim that the BRI facility is located outside the NJSAA. Nevertheless, it is appropriate for the Board to allow for *limited discovery for BRI to obtain evidence to further develop the record as to what the parties intended in their original transaction agreement* before resolving the issues that are presented here. The Board notes that Conrail’s past switching service of the BRI facility is not controlling in determining whether the BRI facility is within the NJSAA.

Slip op. at 4 (emphasis supplied.) The Board further stated:

The Board will allow for *limited discovery pertaining to the parties’ intent in defining the NJSAA boundaries in the original transaction agreement*. The Board is particularly interested in what the parties meant by the use of the term “CP,” or control point, in defining the SAAs. Therefore, the NS and Conrail motions for protective order are denied *to the extent needed to permit the limited discovery*.

Id. at 5 (emphasis supplied.)

ARGUMENT

THE BOARD SHOULD DENY PETITIONERS’ MOTION TO COMPEL

I. RESPONDENTS PROPERLY OBJECTED TO DISCOVERY REQUESTS CONCERNING A TRACK SEGMENT, THE “READING CONNECTOR,” WHICH HAS NOT EXISTED FOR AT LEAST 20 YEARS.

At the end of their petition for clarification or, alternatively, a supplemental order, petitioners included a discussion, of a “possible alternative method of serving the BRI facility.” Pet. at 14-15. This involved a study allegedly being performed by New Jersey Transit to restore “a former Conrail line known as the Reading Connector as part of a project to institute commuter

rail service between Newark/Bound Brook and West Trenton, NJ. This one mile line, which was abandoned in approximately 1985, extended south from a connection with the Raritan Valley Line [owned by New Jersey Transit] at Bound Brook Junction, NJ to Manville, where it connected with CSXT's Trenton (Reading) Line." *Id.* at 14. Petitioners claimed that if this line is restored, "NJ Transit would very likely engage a short-line operator to provide common carrier service over the restored line, including service between Manville Yard and the BRI facility." *Id.* at 15.

Petitioners did not discuss the possibility of restoring the Reading Connector to support the relief they sought, but strictly to "advise[]" the Board of this possibility "if neither of the two forms of relief requested in this Petition is granted," (Pet. at 14), and to inform the Board that petitioners "would view the NJ Transit project favorably" (*id.* at 15) if they did not get satisfaction from the Board.

Two of petitioners' interrogatories (Nos. 3 and 4) and Document Request No. 3 seek information and documents regarding the Reading Connector. Interrogatory No. 3 states:

Please describe the present status and disposition of the Reading Connector, including but not limited to:

- a. The status and/or disposition of the line under the Final System Plan;*
- b. Whether authority was sought and obtained from the ICC, STB or other governmental authority to abandon or discontinue service on the Reading Connector or any part thereof; and if so, the docket number, the date when the abandonment or discontinuance authority became final, and the date when the abandonment or discontinuance authority was exercised; and*
- c. Whether the Reading Connector or any part thereof (including the underlying right-of-way) was sold or leased to another person(s), and if so, the date of the sale or lease, the name of the person(s) to which the property was sold or leased, and the specific property sold or leased.*

Interrogatory No. 4 states:

If the portion of the Reading Connector that crossed the Lehigh Line at grade in the vicinity of Port Reading Jct. were reconstructed/restored to service, either by order of the STB or otherwise, please describe the extent to which the restored Reading Connector would be located within the CP at Port Reading Jct. or otherwise located within the NJSAA.

Document Request No. 3, addressed to Conrail, states:

Please produce all documents related to the sale, lease, abandonment or other disposition of the Reading Connector or any part thereof (including, but not limited to treatment or disposition thereof under the Final System Plan.

All respondents objected to these requests on the ground that they go beyond the limited discovery authorized by the July 31, 2006 Decision and are irrelevant to any issue presented by the petition. Inasmuch as the Reading Connector did not exist when the Transaction Agreement defined the boundaries of the NJSAA, its history and status have no bearing on the issue as to which the July 31, 2006 decision allowed limited discovery. Respondents also objected that Interrogatory No. 4 on the grounds (1) that it is ambiguous because it seems to assume, incorrectly, that the “CP at Port Reading Jct.” encompasses an area rather than a single point and (2) it is hypothetical and speculative, since the possible configurations and physical characteristics of the hypothesized reconstructed line are virtually infinite, and there is no basis for assuming any of them would be feasible or a realistic possibility.

In their motion to compel, petitioners now argue that these discovery requests are appropriate because information about the Reading Connector is relevant to the issue of the where the parties to the Transaction Agreement intended to be the precise location of the boundary of the NJSAA at CP Port Reading Junction and is needed to resolve alleged discrepancies in statements made by NS in its motion to dismiss the petition. No hint of these novel and strained arguments can be found in petitioners’ *petition*, which discussed the Reading

Connector only for the Board's information and as of possible significance only if the Board *denies* the relief sought in the petition, and they are without merit.

First, even if information about the former location of the Reading Connector were relevant to where the parties' intended CP Port Reading Junction to be, nothing in Interrogatory No. 3 or Document Request No. 3 seeks information about the location of the Reading Connector. These requests only seek information about the "status and disposition of the Reading Connector," including its status and disposition under the Final System Plan, details about applications for abandonment or discontinuance authority and details about its sale or lease. Such information has no relevance to the issue of the precise location of the Reading Connector or the location of CP Port Reading Junction. Respondents' relevancy objections to Interrogatory No. 3 and Document Request No. 3 are clearly correct even under petitioners' arguments.

Petitioners argue that Interrogatory No. 4 seeks information about the location of the former Reading Connector because, they now say, it asks whether a restored Reading Connector would be "within the CP at Port Reading Jct. or otherwise located within the NJSA" if it were "restored at the same location where it crossed the Lehigh Line before it was removed from that area." Motion to Compel at 9. This is relevant to the intended location of CP Port Reading Junction, they argue, because NS stated in its motion to dismiss that the deed by which Conrail conveyed the line west of that point to Pennsylvania Lines, LLC shows that CP Port Reading Junction is at Milepost 35.92 and is where CSXT's Trenton Line once crossed the Lehigh Line and extended north to Bound Brook, NJ. Petitioners claim that the deed map shows Milepost 35.92 to the west of where the Trenton Line crossed the Lehigh Line and also to the west of the present connection of the Trenton Line and the Lehigh Line, and they argue that further

information is necessary to “shed light on this discrepancy” (*id.* at 8) and to show whether the term CP Port Reading Junction refers to an area or a specific point.

There is no “discrepancy” in NS’ statements on this matter, and information about the precise location of a line that was removed at least 10 years before the Transaction Agreement was negotiated remains clearly irrelevant to any issue presented by petitioners’ petition. In its motion to dismiss, NS attached the deed by which Conrail conveyed the Lehigh Line to Pennsylvania Lines, LLC, which verbally describes the property conveyed and attaches maps of that property, one of which (Exhibit B-1 to the deed) shows the boundary between Conrail’s property (part of the NJSA) and the conveyed property. Both the verbal description and the map show the boundary to be at “a point” on the Lehigh Line. The verbal description describes the conveyed property in pertinent part as:

Said portion of the Lehigh Valley Railroad, which runs between Port Reading Junction and the common line between Somerset and Hunterdon County, beginning at *a point* on the track centerline of said Railway, *said point being at the northwesterly right of way of the former Delaware and Bound Brook Railroad near Manville at approximately Railway Valuation Station 2244+97, more or less, as shown on Exhibit B-1 and on Railway Valuation Map V-3/24.*

NS Motion To Dismiss, Exhibit 5, page 5 of 7 (emphasis supplied) The map at Exhibit B-1 to the deed (attached to the NS Motion to Dismiss at Exhibit 5, page 7 of 7) shows that point to be “MP 35.92” and “CR Val. Sta. 2244+97.”

In its motion to dismiss, NS correctly stated: “This point is a short distance west of the current switch connection between the Lehigh Line and CSXT’s Trenton Line. The point is located where the Trenton Line once crossed the Lehigh Line and extended north to Bound Brook, NJ, but the crossing track has since been removed. Where the Trenton Line crossed the Lehigh Line was known as Port Reading Junction; as a result of the removal of the crossing track, the actual junction of the two lines is now at the switch connection a short distance east of

that point. For purposes of BRI's claims, it is immaterial whether the boundary of the NJSAA is at Milepost 35.92 or at the current junction, since both points are east of where the Royce Running Track connects to the Lehigh Line (*see* Reistrup V.S., Exhibit 5) and since the Royce Running Track is NS Track." NS Motion to Dismiss at 10, n. 3.

Petitioners assert that the map at Exhibit B-1 shows that the track of the Trenton Line (aka the Reading Connector)² crossed the Trenton Line a short distance east of Milepost 35.92. If this is what it shows and if it is a correct depiction of where the track once was, there is no discrepancy with NS' statement because, as the deed's verbal description states, the boundary point is "at the northwesterly *right of way* of the former Delaware and Bound Brook Railroad," (emphasis supplied). Since the Trenton Line included not only the track but the wider right-of-way as well, it appears correct to state that Milepost 35.92 is where the Trenton Line crossed the Lehigh Line and is the point known as Port Reading Junction.³

In any event, it is irrelevant for purposes of any issues presented by petitioners' petition whether the point known as Port Reading Junction is at Milepost 35.92 or where the tracks of the Trenton Line once crossed the Lehigh Line or where the Trenton Line now connects to the Lehigh line, because all of those points are to the east of where the Royce Running Spur, an NS line, connects to the Lehigh Line and even further east of where the Royce Spur connects to the Royce Running Track. Moreover, even if the differences between those points supported petitioners' claim that "CP Port Reading Junction" encompassed an area rather than a point

² The Reading Connector is petitioners' term for the former continuation of the Trenton Line north of the Lehigh Line to a connection with the Raritan Valley Line at Bound Brook Junction.

³ Respondents intend to provide petitioners with all the maps and track charts in their possession of the rail lines in the vicinity of CP Port Reading Junction, and those maps (continued...)

(which they do not), that would not help petitioners, because at most it could only be argued to indicate an area the entirety of which is to the east of where BRI's industrial spur connects to NS track.

In sum, it is clear from their petition that petitioners are interested in information about the Reading Connector for reasons having nothing to do with the petition's claims for relief, and their strained arguments that it is relevant to their petition should be rejected as groundless.

II. RESPONDENTS CORRECTLY OBJECTED TO REQUESTS FOR INFORMATION ABOUT NEW JERSEY TRANSIT'S RARITAN VALLEY LINE.

New Jersey Transit, New Jersey's commuter authority, owns and provides passenger rail service over an east-west rail line through Bound Brook, NJ that is to the north of CP Port Reading Junction and to the north of BRI's facility, known as the Raritan Valley Line. Conrail and NS have freight operating rights over different parts of that line, but no parts of that line connect with, or can be used to serve, BRI's facility. And as noted in the previous discussion, a former connection between that line and the Trenton Line was removed at least 20 years ago.

As with the Reading Connector, the Raritan Valley Line was discussed in petitioners' petition only in the concluding discussion of a "possible alternative methods of serving the BRI facility" and only as information to the Board.

Two of petitioners' interrogatories, Interrogatories No. 7 and 8, and Document Request No. 2, seeks information and documents about the Raritan Valley Line. Interrogatory No. 7

(...continued)

should be responsive to petitioners' request for information about the location of CP Port Reading Junction.

states:

Please identify the point(s) on NJ Transit's Raritan Valley Line west of Bound Brook, NJ where (a) Conrail's property ownership interest(s) end and (b) west of which NS alone presently provides switching service to and from shipping and receiving facilities.

Interrogatory No. 8 states:

Please state where the point on the former Lehigh Valley Railroad (now NJ Transit's Raritan Valley) line representing the beginning of the portion of that line that Conrail transferred to Pennsylvania Lines LLC by quitclaim deed, as described in paragraph 2 on page 5 of Exhibit B to NS's February 9, 2006 Motion to Dismiss BRI/ECDC's Petition in this proceeding, is located in relation to Bound Brook Junction (the point where the former Reading Connector connected with what is now the Raritan Valley line).

Respondents objected to this interrogatory on the ground that it is irrelevant to any issue presented by the BRI/ECDC Petition and is not reasonably calculated to lead to the discovery of relevant evidence. They noted that BRI's facility does not and cannot receive rail service from that line. For the same reasons they objected to Document Request No. 2 to the extent it sought maps and other documents pertaining to the Raritan Valley Line.

Petitioners' motion to compel argues that these requests are "relevant in determining the extent to which property ownership demarcations govern the limits of the NJSAA at other locations, including nearby Port Reading Jct." Motion to Compel at 11. Petitioners further contend that NS somehow raised this issue in its motion to dismiss. *Id.*


Petitioners' motion to compel provides no coherent explanation of how information about ownership interests and operating rights over the Raritan Valley Line could have any relevance to the issues presented by their petition – whether BRI's facility is within the NJSAA. NS' motion to dismiss made no arguments about the Raritan Valley Line and in fact made no mention of it. As the Board noted in its July 31, 2006 Decision, whether or not Conrail provided switching to BRI's facility itself is not determinative of whether the BRI facility is within the

NJSAA. What interests Conrail has and what services it provides over lines that do not and cannot serve BRI's facility has no relevance to that issue, but is plainly a fishing expedition seeking information for purposes unrelated to the relief sought by the petition.

CONCLUSION

The Board should deny petitioners' motion to compel.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard A. Allen", written over a horizontal line.

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September 8, 2006

CERTIFICATE OF SERVICE

I certify that I have this 8th day of September, 2006, caused copies of the foregoing Reply of Norfolk Southern Corporation and Norfolk Southern Railway Company to Petitioner's Motion To Compel Responses to Discovery Requests Involving Relevancy Objections to be served by hand or first class mail, postage prepaid, on the following:

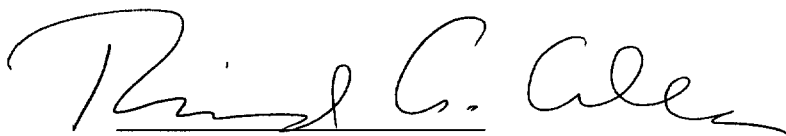
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